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Jeffrey G. Sloane, Esq. (NSB# 784)
 Regina M. McConnell, Esq. (NSB# 8029)
 Kravitz, Schnitzer, Sloane, Johnson & Eberhardy, Chtd.
 1389 Galleria Drive, Suite 200
 Henderson NV 89014
 Telephone: (702) 362-6666; Facsimile: (702) 362-2203
rmcconnell@kssattorneys.com
jsloane@kssattorneys.com

and

Richard J. Mason, PC
 Patricia K. Smoots
 Michael M. Schmahl
 McGuireWoods LLP
 77 W. Wacker Drive, Suite 4100
 Chicago, IL 60601
 Telephone: (312) 849-8100; Facsimile: (312) 849-3690
rjmason@mcguirewoods.com
psmoots@mcguirewoods.com
mschmahl@mcguirewoods.com

Admitted Pro Hac Vice

**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

Case No. BK-S-06-10725 LBR
 Case No. BK-S-06-10726 LBR
 Case No. BK-S-06-10727 LBR
 Case No. BK-S-06-10728 LBR
 Case No. BK-S-06-10729 LBR

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC
 Debtor.

Chapter 11

In re:
 USA CAPITAL FIRST TRUST DEED FUND, LLC
 Debtor.

**Jointly Administered Under
 Case No. BK-S-06-10725 LBR**

In re:
 USA SECURITIES, LLC,
 Debtor.

Affects:

- ☐ All Debtors
☐ USA Commercial Mortgage Company
☐ USA Securities, LLC
☐ USA Capital Realty Advisors, LLC
☐ USA Capital Diversified Trust Deed Fund, LLC
☒ USA First Trust Deed Fund, LLC

Date: May 9, 2007

Time: 9:30 A.M.

**SUR-REPLY OF THE KANTORS TO OMNIBUS OBJECTION OF THE
 OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA
 CAPITAL FIRST TRUST DEED FUND, LLC TO CLAIMS SUPERCEDED BY
 COMPROMISE CONTAINED IN DEBTORS' THIRD AMENDED JOINT
 CHAPTER 11 PLAN OF REORGANIZATION (AS MODIFIED)
 (AFFECTS DEBTOR USA CAPITAL FIRST TRUST DEED FUND, LLC)**

1 The Kantors¹, hereby submit this Sur-Reply (the “Sur-Reply”) in response to the
2 Reply (the “Reply”) [Docket No. 3006] of the Official Committee (the “Committee”) of
3 Equity Security Holders of USA Capital First Trust Deed Fund, LLC (“FTDF”) in
4 Support of Its Omnibus Objection (the “Objection”) [Docket No. 2295] to Claims
5 Superseded by Compromise Contained in Debtors’ Third Amended Joint Chapter 11 Plan
6 of Reorganization (as Modified) (the “Plan”), and, in support thereof, respectfully states
7 as follows:
8

9 **I. Introduction**

10 As stated in the Response, prior to the commencement of these bankruptcy cases,
11 the Kantors invested money with the Debtors in these jointly-administered bankruptcy
12 cases, including substantial amounts in the USA Capital Diversified Trust Deed Fund,
13 LLC (the “DTDF”).² The Kantors filed timely proofs of claim against the FTDF based
14 on the common law torts of fraud and conspiracy and a statutory action for consumer
15 fraud (pursuant to N.R.S. 41.600(2)(c)) seeking unliquidated damages against the FTDF
16 estate to compensate each of the Kantors for injuries suffered by the actions,
17 representations, and omissions of FTDF and the other Debtors. The claims are asserted
18 directly against the FTDF and are not derived by, from, through, or under any entity.
19

20 The disputes presently before the Court are confused by the fact that the
21 Committee appears to have initially ignored the substance of the Kantor Claims and
22 mischaracterizes the Kantor Claims as “Compromised Claims.” As such, the Committee
23 asserted, without citing any authority, that the Kantor Claims were somehow precluded
24 by the Intercompany Compromise contained in the Plan and should be disallowed.
25

26
27 ¹ Unless otherwise defined herein, all defined terms are used as they were defined in the Kantors’ Response
(the “Response”) to the Omnibus Objection [Docket No. 2841] filed on February 20, 2007.

28 ² References to the Kantors’ investments are not intended to suggest that the Kantors own any investment
as a group. In fact, each of the Kantors owns his/her/its investments independently.

1 In its Reply, the Committee acknowledges that “it assumed that the Kantor
2 Claims were based, in substance, upon the argument for recharacterization that has been
3 developed” by various other parties in these jointly-administered bankruptcy cases.
4 *Reply* at p. 5. The Committee then seems to suggest that the Committee was somehow
5 misled as to the nature of the Kantor Claims and goes on to state that the Kantors “now
6 expressly disclaim” that the Kantor Claims are based on any recharacterization theory
7 and “have clarified” that the Kantor Claims allege direct causes of action against the
8 FTDF. *Id.* The Kantors have never previously asserted the so-called “recharacterization”
9 argument and have never attempted to characterize the Kantor Claims as anything other
10 than what they are — direct claims against the FTDF based on fraud, conspiracy to
11 commit fraud, and consumer fraud.
12

13 Further complicating this proceeding is the fact that the Committee improperly
14 raised two additional objections for the first time in its Reply. Acknowledging that these
15 arguments were not properly raised, the Court requested that the Kantors prepare and file
16 this Sur-Reply and continued the hearing on the Objection until May 9, 2007.³ The
17 Kantors appreciate the opportunity to respond to these arguments, particularly in light of
18 the fact that Committee failed to cite any statutory authority or case law in support of its
19 Objection until the Reply. However, the Kantors have been prejudiced by the manner in
20 which the Committee has raised these arguments and have been compelled to incur
21 additional legal fees and expenses to prepare for oral argument on March 15, 2007, to
22 travel from Chicago for the hearing on March 15, 2007, and to prepare two written
23 responses to the Objection and the Reply.
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28 ³ On March 15, 2007, the hearing on the Objection was originally continued to April 26, 2007, and then subsequently re-scheduled for May 9, 2007.

1 In total, the Committee now argues that the Kantor Claims should be disallowed:
 2 (i) as having been precluded by the Intercompany Compromise contained in the Plan; (ii)
 3 because, in the Committee's view, the Kantors have not satisfied the requirements of
 4 Federal Rule of Civil Procedure 9(b)⁴ or propounded any evidence in support of the
 5 Kantor Claims; and (iii) as subordinated claims pursuant to section 510(b) of the
 6 Bankruptcy Code. As will be shown below, the Committee's objections are overstated at
 7 best and fail in every instance. Thus, the Court should overrule the Objection and allow
 8 the Kantor Claims in full.
 9

10 **II. The Kantor Claims Are Not Precluded By the Intercompany Compromise.**

11 The Committee's baseless vitriol and apparent amazement notwithstanding⁵, the
 12 Kantor Claims are not based on "buyer's remorse" and are not attempts to recover
 13 investment losses or any injury to the DTDF. As the Kantors have shown in their
 14 Response, the Kantor Claims have been asserted against the FTDF to recover damages
 15 based on the FTDF's role in the alleged fraudulent conspiracy that defrauded the Kantors,
 16 collectively, of several millions of dollars.
 17

18 The Committee's argument simply fails to address the fact that the Kantors
 19 each suffered an individual injury as a result of this fraudulent scheme that is separate
 20 and apart from the any injury that may have been suffered by the DTDF or any other
 21 equity holder in the DTDF. The Committee's reliance on *Henderson v. Buchanan (In re*
 22 *Western World Funding, Inc.)*, 52 B.R. 743, 774-775 (Bankr. D. Nev. 1985), clearly
 23 illustrates this point. Although that case involved a breach of fiduciary duty action
 24

25 ⁴ For ease of reference, all further references to specific Federal Rules of Civil Procedure will be made to
 26 Fed. R. Civ. P. _____. Similarly, all references to specific Federal Rules of Bankruptcy Procedure will be
 27 made to Fed. R. Bankr. P. _____.

28 ⁵ Furthermore, the fact that the Kantors voted in favor of the Plan is irrelevant. As discussed in the
 Response, the Plan does not contain any compromise, release, or other impediment relating to any claims
 individual equity holders in the DTDF may have against the FTDF. Therefore, the Kantors support for the
 Plan, which left these direct claims unaffected, cannot now be construed to have been a release or waiver of
 such claims.

initiated by a trustee, the court expressly acknowledged the existence of direct claims of individuals that may be pursued independently of any derivative action. *See id.*, 52 B.R. at 774-775. The fact that the breach of fiduciary duty involved in that case was an injury to the corporation and not a direct injury to any one or more of the shareholders is irrelevant. As stated by the *Western World Funding* court, the “dividing line” between personal claims and derivative claims is:

whether the cause of action is one which is purely personal, in which no other claimant or creditor of the corporation has an interest, or whether the cause of action is one in favor of creditors in general, which may be availed by “any” one creditor either suing alone (as it is sometime held he may) or as a representative of all the creditors. **In the one case the only liability is to the particular person injured, who may or may not be a creditor of the corporation, as in the case of an action for deceit**, while in the other case the liability is to all creditors of the corporation without regard as to any personal dealings between such officers and such creditors. *Id.* at 774-775 (emphasis supplied).

The Kantor Claims are based solely on the injury suffered by each of the Kantors as victims of the fraudulent conspiracy in which the FTDF was one of the conspirators. The Kantors have not asserted derivative actions on behalf of the DTDF and are not attempting to recover for any injury suffered by the DTDF, the DTDF’s assets, or any other DTDF members. As pointed out in the Kantors’ Response, the fact that the DTDF may have a separate cause of action for the same or similar wrong is simply irrelevant. *See Sutter v. General Petroleum Corporation*, 170 P.2d 898, 901 (Cal. 1946) (“[A] stockholder may sue as an individual where he is directly and individually injured although the corporation may also have a cause of action for the same wrong.”)⁶.

The other authorities cited by the Committee in its Reply also support the Kantors’ position. Each of those courts specifically recognized the right to independently

⁶ The Committee failed to address either the *Sutter* case or *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), in its Reply.

1 assert direct claims, such as the Kantor Claims, to recover for injuries suffered personally
2 by individual shareholders. *See Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720, 732 (Nev.
3 2003) (“Because a derivative claim is brought on behalf of the corporation, a former
4 shareholder does not have standing to assert a derivative claim. A former shareholder
5 does, however, have standing to seek relief for direct injuries that are independent of any
6 injury suffered by the corporation.”); *Federal Land Bank of Spokane v. Stiles*, 700 F.
7 Supp. 1060, 1066 (D. Mont. 1988), *quoting Sax v. World Wide Press, Inc.*, 809 F.2d 610,
8 614 (9th Cir. 1987) (“Applying Montana law, the Ninth Circuit recently held that ‘[a]
9 direct action can be brought either when there is a special duty, between the wrongdoer
10 and the shareholder, or when the shareholder suffers injury separate and distinct from that
11 suffered by other shareholders.’”).
12

13 To the extent that any of these cases may support the Committee’s argument, if
14 any, they are easily distinguishable from the present dispute, because none of these cases
15 involve direct actions based on fraud or conspiracy. *See Western World Funding*, 52
16 B.R. 743 (involving a claim for breach of fiduciary duty owed to corporation but
17 specifically noting that actions involving deceit are likely to be direct claims); *Cohen*, 62
18 P.3d 720 (breach of fiduciary duty owed to corporation); and *Stiles*, 700 F. Supp. 1060
19 (breach of fiduciary duty owed to corporation to recover devaluation of stock value).
20

21 Having been unwilling or unable to negotiate a waiver or release of direct fraud
22 and conspiracy claims held by the Kantors or any other individual DTDF members
23 through the Plan confirmation process, the Committee cannot now be permitted to
24 recharacterize these direct claims as derivative actions covered by the Intercompany
25 Compromise.
26
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28

1 **III. Kantor Claims Are Valid Proofs of Claim.**

2 The Committee's first new objection raised in the Reply is that the Kantor Claims
3 should be disallowed, because, in the Committee's view, the Kantors have not pled their
4 claims with adequate particularity and have not, as of yet, provided any evidentiary
5 support for these claims. This new objection misunderstands the nature of the claims
6 administration process established in the Bankruptcy Code and fails to establish a basis to
7 disallow the Kantor Claims.
8

9 The Kantor Claims are valid proofs of claim under Fed. R. of Bankr. P. 3001. *See*
10 Fed. R. Bankr. P. 3001(a) (providing that a valid proof of claim need only be a written
11 statement setting forth a creditor's claim in a manner conforming to the official proof of
12 claim form). As properly executed and filed proofs of claim the Kantor Claims
13 themselves "constitute *prima facie* evidence of the validity and amount" of the Kantor
14 Claims, Fed. R. Bankr. P. 3001(f), which are presumptively valid. *See* 11 U.S.C. §
15 502(a); *U.S. v. Offord Finance, Inc. (In re Medina)*, 205 B.R. 216, 222 (9th Cir. B.A.P.
16 1996). Moreover, the Committee has not alleged that the Kantors have failed to properly
17 alleged actions for fraud and conspiracy under applicable Nevada law.
18

19 The Committee now bears the initial burden of presenting evidence to overcome
20 the *prima facie* validity of the Kantor Claims. *See id., In re Holm*, 931 F.2d 620, 623 (9th
21 Cir. 1991) ("[T]he allegations of the proof of claim are taken as true. If those allegations
22 set forth all the necessary facts to establish a claim and are not self-contradictory, they
23 *prima facie* establish a claim. Should objection be taken, the objector is then called upon
24 to produce evidence and show facts tending to defeat the claim by probative force equal
25 to that of the allegations of the proofs of claim themselves."). The burden of proof will
26 shift back to the Kantors only if the Committee comes forward with evidence sufficient to
27 demonstrate a true dispute with the averments in the Kantor Claims. *See In re*
28

1 *Sendmygift.com, Inc.*, 280 B.R. 667, 674 (Bankr. D. Minn. 2002); *In re Wells*, 51 B.R.
2 563 (D. Colo. 1985); *Matter of Unimet Corp.*, 74 B.R. 156 (Bankr. N.D. Ohio 1987).
3 Unlike the debtor in *Hilton v. Hongisto (In re Hongisto)*, 293 B.R. 45 (Bankr. N.D. Cal.
4 2003)⁷, cited in the Reply, the Committee has neither answered the allegations in the
5 Kantor Claims nor provided any evidentiary basis suggesting the existence of a factual
6 dispute.
7

8 The Committee further argues, unconvincingly, that the Kantor Claims should be
9 disallowed, because, in the Committee's assessment, the Kantor Claims do not satisfied
10 the standards of Fed. R. Civ. P. 9(b). Tellingly, the Committee has failed to provide any
11 authority suggesting that Fed. R. Civ. P. 9(b), which is not incorporated by Fed. R.
12 Bankr. P. 3001, is applicable in determining the *prima facie* validity of proofs of claim.
13

14 In fact, the *Sendmygift.com* court held that mere "terse" statements referencing
15 fraud are sufficient to establish a valid proof of claim. *See In re Sendmygift.com, Inc.*,
16 280 B.R. at 674 ("Here the [claimants] staked out their position in fact and law by filing
17 proofs of claim with certain averments-that they were defrauded in the purchase of their
18 equity shareholding in the debtor and had a right to their money back. The averments on
19 the proofs of claim were just that terse, but under the rule and case law this was enough
20 to meet their initial burden. It established them as holders of claims against the estate. If
21 the Debtor wishes to avoid that result . . . it must shoulder its burden of production, and
22 must muster evidence going to the elements of fraud and loss that underlie the claims.").
23 The allegations of fraud and conspiracy in the Kantor Claims greatly exceed mere terse
24 statements and are valid proofs of claim.
25

26 ⁷ *Hongisto* is entirely distinguishable from the case at bar. That case merely stands for the proposition that
27 if a creditor fails to adequately state a claim in its proof of claim, then the creditor bears the initial burden
28 of proof at trial. *See* 293 B.R. at 51. The debtor in that case filed an answer to the proof of claim, the
parties conducted discovery, and the court disallowed the proof of claim after a trial in which the creditor
failed to put on any evidence. This case is not at all analogous to the case presently before the Court and
certainly does not provide any basis for disallowing the Kantor Claims at this early juncture.

1 The Committee's reliance on *Swartz v. KPMG LLP*, 476 F.3d 756 (9th Cir. 2007),
2 is entirely misplaced. This case is readily distinguishable, because it involved litigation
3 outside of the bankruptcy context, did not construe Fed. R. Bankr. P. 3001, and did not
4 purport to establish any standards applicable to evaluating proofs of claim. More
5 importantly, the Ninth Circuit held in *Swartz* that the dismissal of the plaintiff's
6 complaint was without prejudice and that the plaintiff was entitled to amend the
7 complaint to make additional allegations to cure any defects. *See id.*, 476 F.3d at 765
8 ("[A]lthough the lack of specificity in Swartz' allegations of fraud provides an
9 independent reason . . . to affirm [the district court's] dismissal, of Swartz' fraud claims,
10 that dismissal would necessarily be without prejudice."). Therefore, even if *Swartz* did
11 apply to the Kantor Claims, this case mandates that the Kantors be permitted to amend
12 the Kantor Claims and does not provide any basis on which to disallow them.⁸

14 Moreover, the wholesale disallowance of proofs of claim on the technical basis
15 proposed by the Committee is entirely inappropriate in the bankruptcy context and in
16 these bankruptcy cases in particular. Much like other parties in interest in these
17 bankruptcy cases, the Kantors did not become aware of the massive fraud perpetrated by
18 the Debtors until at or about the time these cases were commenced. Under Nevada law,
19 the Kantors normally would have had a three-year window to investigate and initiate the
20 causes of action alleged in the Kantor Claims. *See* N.R.S. 11.190(3). However, due to the
21 applicable claims bar date, the Kantors were compelled to prepare and file the Kantor
22 Claims on or before November 13, 2006, a mere seven months after discovering the
23 underlying fraudulent conduct and conspiracy. *See* Order Setting Deadline for Filing
24 Proofs of Claim and Proofs of Interest (Affects All Debtors) [Docket No. 1280]. To
25

27 ⁸ Furthermore, the Ninth Circuit also has "a long-established liberal policy toward amendment of proofs of
28 claim." *Sambo's Restaurants, Inc. v. Wheeler (In re Sambo's Restaurant, Inc.)*, 754 F.2d 811, 816 (9th Cir.
1985); *see also In re Stoecker*, 5 F.3d 1022, 1028 (7th Cir. 1993).

1 disallow the Kantor Claims for failing to meet the requirements of Fed. R. Civ. P. 9(b)
 2 would be particularly unjust under these circumstances.

3 If the Committee contests the substance of the Kantor Claims, the Committee
 4 should have filed an answer and shifted the burden of proof back to the Kantors. As a
 5 contested proceeding under Fed. R. Bankr. P. 9014, the Kantors would be entitled to
 6 conduct discovery and could then amend the Kantor Claims if necessary or appropriate.
 7

8 **IV. The Kantor Claims Are Not Precluded Under Section 510(b).**

9 The second new yet misguided argument raised by the Committee in the Reply is
 10 that the Kantor Claims are precluded by the subordination provisions of section 510(b) of
 11 the Bankruptcy Code. This argument necessarily fails, because the FTDF and the DTDF
 12 are not “affiliates” within the meaning of the Bankruptcy Code. Additionally, assuming
 13 that the Kantor Claims are subordinated, the plain language of section 510(b) fails to
 14 effect a meaningful distribution in this instance.
 15

16 **1. FTDF and DTDF are not affiliates.**

17 Although not stated in the Reply, the Committee appears to base its section 510(b)
 18 argument on the mistaken presumption that the FTDF and the DTDF are affiliates.⁹
 19 Section 510(b) provides in relevant part that:

20 For the purpose of distribution under this title, a claim arising
 21 from rescission of a purchase or sale of a security of the debtor
 22 **or of an affiliate of the debtor**, for damages arising from the
 23 purchase or sale of such a security, or for reimbursement or
 24 contribution allowed under section 502 on account of such a
 claim, shall be subordinated to all claims or interests that are
 senior to or equal the claim or interest represented by such
 security . . .

25 11 U.S.C. § 510(b) (emphasis supplied).

26 ⁹ Although the Committee never expressly states this in the Reply, it has highlighted the provision
 27 addressing affiliates in that section. Moreover, since the Kantor Claims were filed against the FTDF, it
 28 would seem that this presumption is necessary to support the Committee’s argument. To the extent that the
 Committee relies on some other basis for asserting its 510(b) argument, the Kantors reserve all of their
 rights to amend and supplement their arguments accordingly.

1 In the context of the present dispute, the term affiliate is defined in section
2 101(2)(B)¹⁰, which provides in pertinent part that:

3 (2) The term “affiliate” means—
4 (B) corporation 20 percent or more of whose outstanding
5 voting securities are directly or indirectly owned,
6 controlled, or held with power to vote, by the debtor,
7 or by an entity that directly or indirectly owns, controls,
8 or holds with power to vote, 20 percent or more of the
9 outstanding voting securities of the debtor . . .
10 11 U.S.C. § 101(2)(B).

11 The plain language of this statute requires either that (i) the FTDF directly or indirectly
12 own at least a twenty percent equity interest in the DTDF; or (ii) there is an entity that
13 directly or indirectly owns at least a twenty percent stake in both the FTDF and the the
14 DTDF. The Committee has not provided any evidence that either of these circumstances
15 exist¹¹ and, thus, has not provided any basis pursuant to which the Court can conclude the
16 FTDF and the DTDF are affiliates within the meaning of section 101(2)(B).

17 The Kantors acknowledge that both the FTDF and the DTDF are limited liability
18 companies that shared the same manager, USA Capital Realty Advisors, LLC.¹² See
19 Operating Agreement of the DTDF [**Docket No. 1590**] and Operating Agreement of the
20 FTDF [**Docket No. 1591**]. However common management alone is not a basis upon
21 which section 101(2) confers affiliate status. See *Agresti v. EBAR East, Inc. (In re*
22 *Elephant Bar Restaurant, Inc.)*, 196 B.R. 747, 751 (Bankr. W.D.Pa. 1996) (“*Elephant*

23 ¹⁰ Section 101(2) has a total of four subsections defining the term affiliate. Section 101(2)(A) describes a
24 vertical parent-subsidary relationship in which a debtor’s parent company is an affiliate. Sections
25 101(2)(C) and 101(2)(D) respectively bestow affiliate relationships between a debtor and its operating
26 company or between a debtor and a company operated by that debtor. None of these provisions is
27 applicable to the more distant, horizontal relationship between the FTDF and the DTDF, which do not have
28 a parent-subsidary relationship nor are there any leases or operating agreements between these two
Debtors.

¹¹ The Committee has acknowledged that the equity in the FTDF is owned by approximately 950 different
members and the equity in the DTDF is owned by approximately 1,900 different individuals. See
Objection at ¶¶ 13-14.

¹² The Kantors notes that USA Capital Realty Advisors, LLC, the manager of both the DTDF and the
FTDF, is wholly owned by USA Investment Partners, a non-debtor.

1 Bar”); see also *Redmond v. Ellis County Abstract & Title Co. (In re Liberty Livestock*
2 *Comp.)*, 198 B.R. 365, 371 (Bankr. D. Kan. 1996) (establishing affiliate relationship
3 between two corporations solely on basis that wife was sole stockholder in both
4 companies and ignoring fact that husband was president of both companies).

5 *Elephant Bar* is directly on point. That case involved a motion by a chapter 7
6 trustee of the estate of Elephant Bar Restaurant, Inc. (“EBRI”), seeking to transfer the
7 chapter 11 case of EBAR East, Inc. (“EBAR”), as an affiliated debtor. As that court
8 determined the “threshold issue . . . is whether [EBAR] is an affiliate of [EBRI]” within
9 the meaning of sections 101(2)(A) or 101(2)(B). *Id.* at 749. Among other things, the
10 chapter 7 trustee argued that these two companies were affiliates because of: (i) one
11 individual who owned thirty percent of the equity in EBAR and ten percent of the equity
12 in EBRI also held an executive position in both EBRI and a holding company that owned
13 eighty percent of EBRI’s remaining equity; or (ii) a separate individual who owned
14 twenty percent of EBAR was also the chief financial officer of EBRI and its holding
15 company. See *id.* at 750-751. In refuting each of these arguments, the court held “as a
16 matter of law, that ‘control,’ as that term is used in 11 U.S.C. § 101(2), can only be
17 attained by way of equity ownership, either direct or indirect (i[.e. tiered), and not be
18 mere virtue of an official position.” *Id.* at 751.¹³

19
20
21 Absent a showing of a common equity holder owning at least twenty percent of
22 both FTDF and DTDF, the Court cannot conclude that these Debtors are affiliates. As
23 such, section 510(b) has no application to the Kantor Claims.
24
25

26 ¹³ The *Elephant Bar* court further noted that “[C]ontrol of . . . [a] debtor’ by virtue of an official position, or
27 essentially operating control of such entity, may be sanctioned as a method by which a relationship as an
28 ‘insider’ is established.” It is important to note that the statutory definition of an insider is broader than that
of an affiliate. This definitional difference is not relevant to this dispute as subordination pursuant to
section 510(b) does not turn on a creditor’s status as an insider.

1 2. **Plain meaning of section 510(b) renders the consequence of**
2 **subordination meaningless in this instance.**

3 Even if the FTDF and the DTDF were affiliates, the Committee's subordination
4 argument has absolutely no practical effect. By its own terms, section 510(b) only
5 subordinates claims for damages arising from the purchase or sale of a security of an
6 affiliate of the debtor "to all claims or interests that are senior to or equal the claim or
7 interest represented by such security." 11 U.S.C. § 510(b). Since the Kantor Claims are
8 related to a purchase or sale of membership interests in the DTDF, these claims would
9 only be subordinated to the distributions from the FTDF estate that are senior or equal to
10 claims "represented by" membership interests in the DTDF. In this instance, all claims
11 related to the purchase or sale of equity interests in the DTDF would, like the Kantor
12 Claims, be general unsecured claims. Therefore, at most, the Kantor Claims would be
13 subordinated to other unsecured claims but would still receive a distribution before the
14 equity holders in the FTDF.
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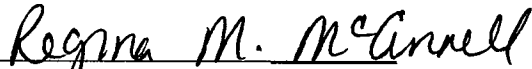
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V. Conclusion

For the reasons set forth herein, the Kantors respectfully request that the Court enter overruling the Objection, allowing the Kantor Claims in full, and granting such other and further relief as the Court determines is just or appropriate.

DATED this 29th day of March, 2007

Respectfully submitted:



Jeffrey G. Sloane, Esq. (NSB# 784)

Regina M. McConnell, Esq. (NSB# 8029)

Kravitz, Schnitzer, Sloane, Johnson & Eberhardy, Chtd.

1389 Galleria Drive, Suite 200

Henderson NV 89014

Telephone: (702) 362-6666; Facsimile: (702) 362-2203

rmcconnell@kssattorneys.com

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Michael M. Schmahl

McGuireWoods LLP

77 W. Wacker Drive, Suite 4100

Chicago, IL 60601

Telephone: (312) 849-8100; Facsimile: (312) 849-3690

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psmoots@mcguirewoods.com

mschmahl@mcguirewoods.com

Admitted Pro Hac Vic